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In the Supreme Court of the United States

W. C. TUCKER,
Plaintiff in Error and Petitioner,

vs.

ACEL C. ALEXANDER, Commissioner of Internal Revenue,
Defendant in Error and Respondent.

PETITION FOR WRIT OF CERTIORARI

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INDEX

SUBJECT

	Page
Petition in suit filed in trial court	1- 4
Claim for refund of tax filed with Commissioner	5- 6
Answer of defendant in trial court	6
Finding of facts and judgment of trial court	6-11
Assignment of errors in Circuit Court of Appeals	12-14
Decision and judgment of Circuit Court of Appeals	14-19
Conflict with decision of another Circuit Court of Appeals as ground for writ	19-22
Important unsettled questions of Federal Law as ground for writ	22-24
Decision probably untenable and in conflict with weight of authority as ground for writ	24-26
Prayer for writ	26-27
Verification to petition	27-28
Brief and Argument:	
First ground for writ	29
Second ground for writ	31
Third ground for writ	46

TABLE OF CASES AND STATUTES

Walker vs. Gulf & I. Ry. Co. of Texas, 269 Fed. 885	19-21
Redwing Malting Co. vs. Willcuts, Collector, not reported	24-42
Rev. Stats., Sec. 3220, as Amended by Sec. 1315 Revenue Act of 1921	33
Rev. Stats., Sec. 3226, as Amended by Sec. 1318, Revenue Act of 1921	22-23

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To the Honorable Supreme Court of The United Statess

The petition of W. C. Tucker, plaintiff in error, respectfully shows to this Honorable Court that he filed in the District Court of the United States for the Western District of Oklahoma his petition in an action at law on October 21, 1924, against Acel C. Alexander, Collector of Internal Revenue for the District of Oklahoma, as defendant, which petition, omitting the title thereof and exhibits attached thereto, is as follows:

[R. 3] "Comes now W. C. Tucker, the plaintiff above named, and for his cause of action against Acel C. Alexander as Collector of Internal Revenue, the defendant above named, alleges and says:

"(1) That the plaintiff resides at Pawhuska, Osage County, Oklahoma, in the Western District of said State, and the defendant resides at Oklahoma City, Oklahoma

County, Oklahoma, in the Western District of said State, and is, and was at all times herein mentioned, Collector of Internal Revenue for the United States for the District of Oklahoma.

"(2) That some time in the year 1923 additional income tax for the year 1920 in the sum of $8,610.84 was assessed against the plaintiff by the Commissioner of Internal Revenue under the Revenue Laws of the United States; that on or about the 5th day of October, 1923, the plaintiff received from the defendant a notice and demand in writing for the payment of said additional tax, which notice and demand was dated October 4, 1923, and notified the plaintiff that if payment of said tax was not made within ten days after the [R. 4] date thereof, a penalty of 5 per cent of the amount of such tax would be added, plus interest at the rate of 1 per cent a month, a full, true and correct copy of which notice and demand is hereto attached, marked Exhibit 'A' and made a part hereof; that pursuant to said notice and demand, and in order to avoid the penalty and interest to be imposed for failure to pay said tax, and also in order to avoid the issuance of a distraint warrant for the collection thereof and a levy upon and sale of his property, the plaintiff paid the said sum of additional tax to the defendant as Collector of Internal Revenue for the United States at Oklahoma City, Oklahoma, under protest, on October 30, 1923, and took his receipt therefor, a full, true and correct copy of which receipt is hereto attached, marked Exhibit 'B' and made a part hereof; and that said additional income tax was erroneously and illegally assessed against and collected from the plaintiff and was paid by the plaintiff under protest after demand and with threat of penalty for failure to pay the same.

"(3) That the assessment and collection of said additional income tax was erroneous and illegal in that it is based upon alleged income accruing to the plaintiff from the liquidating dividend upon the dissolution of the Osage Mercantile Company, a corporation, in which he

was a stockholder; that this corporation was chartered and organized in the year 1902 with a capital stock of $15,000.00 divided into 150 shares of the par value of $100.00 each; that thereafter in the year 1906 the capital stock of said corporation was increased to $30,000.00 divided into 300 shares of the par value of $100.00 each; that on March 1, 1913, the plaintiff was the owner and holder of 112 shares of the capital stock in said corporation and the same was of the fair market value of $500.00 a share on said date; that on July 22, 1920, said corporation was liquidated and dissolved and its assets were transferred and distributed *in specie* to its stockholders by a liquidating dividend; that the net actual and fair market value of the assets so distributed was $88,408.97 on that date; that the share of such assets received by the plaintiff was less in value by the sum of $5,491.84 than the fair market value on March 1, 1913, of the stock he then owned plus the cost of the stock he subsequently acquired, and he, therefore, sustained an actual loss in said amount on the liquidation of said corporation; that in ascertaining the gain or loss to the plaintiff upon the liquidation of said corporation, the Commissioner of Internal Revenue erroneously, wrongfully and [R. 5] illegally assumed and took *$356.86 per share, instead of the correct sum of $500.00 per share, as the fair market value of the plaintiff's stock on March 1, 1913, and $97,292.71, instead of the correct sum of $88,408.97, as the net actual and fair market value of the assets of said corporation distributed at the time of liquidation in excess of all its liabilities then outstanding and assumed by its stockholders; that this erroneous, wrongful and illegal action of the Commissioner distorted and exaggerated the true and actual net income of the plaintiff and made it appear that he had a total net income of $65,698.58 for the year 1920, whereas, he had in fact a total net income of only $40,975.90 for said year; that in his

*Corrected by a trial amendment by permission of the court with consent of the defendant to $203.71 [R. 43]. By mistake the original figures instead of the amended ones appear in the transcript of the record.

income tax return for said year he did not claim or take said loss of $5,491.84 sustained on liquidation of said corporation as a deduction fro income, but concluded said sum in his income and returned net income subject to tax in the sum of $46,467.74 and computed and paid the tax thereon in the sum of $5,172.92 as provided by law; that the Commissioner took said erroneous and exaggerated sum of $65,698.58 as the plaintiff's net income for said year and computed and assessed said additional tax thereon; and that, therefore, said additional tax was excessive and was erroneously and illegally assessed and collected.

"(4) That on the 2nd day of November, 1923, the plaintiff filed with the Commissioner of Internal Revenue his claim for refund of the said sum of additional tax, so erroneously, illegally and wrongfully assessed, collected and paid, which claim for refund was in due form of law and upon the form prescribed therefor by said Commissioner, and a full, true and correct copy of the same is hereto attached, marked Exhibit 'C' and made a part hereof; and that more than six months have elapsed since the filing of said claim with said Commissioner and he has not rendered a decision thereon.

"Wherefore, the plaintiff prays that he have and recover of and from the defendant a judgment for the sum of $8,610.84, with interest thereon at the rate of 6 per cent per annum from the 30th day of October, 1923, and the costs of the action."

That Exhibit "A" to the foregoing petition, being the claim for refund of the tax sued for, was made upon the printed form prescribed and provided for that purpose under regulations established by the Secretary of the Treasury pursuant to law, and contained the following statement of the grounds upon which the claimant believed the refund of tax should be allowed:

[R. 57] "That the tax involved herein is based on an alleged profit accruing to the taxpayer upon the liquidation of the Osage Mercantile Company. It was erroneously assessed because the taxpayer actually had a loss instead of a profit on the liquidation of said company as fully appears from his appeal to the Commissioner from the proposed assessment of additional tax, dated August 10, 1923, designated IT:PA:FR-JRC-708, W. C. Tucker, Pawhuska, Oklahoma, and now on file in the office of the Commissioner, and which is hereby referred to and adopted as a part of this claim. Said appeal was not considered in the assessment of the additional tax because not filed in time, and the taxpayer was advised by the Commissioner's letter of October 24, 1923, a copy of which is attached hereto and made a part hereof, that upon his payment of the tax and filing of a claim for refund his contentions would be considered and passed upon in the light of his supporting evidence. The additional tax of $8,610.84 was paid under protest on October 30, 1923. The taxpayer is, therefore, entitled to interest on the tax refunded from the date of payment."

By reference, as held by the Circuit Court of Appeals, the following more specific statement of the grounds relied upon was adopted into and made a part of the said claim:

[R. 57.] "The tax payer says that said Revenue Agent's report is erroneous (1) in that he used the book value of the taxpayer's stock in the Osage Mercantile Company on March 1, 1923, instead of the fair market value thereof as a basis for determining the gain derived therefrom at liquidation, and (2) in that he did not deduct from the capital and surplus of said Company at date of liquidation, the full amount of its outstanding liability, and (3) in that he did not take into account the reduction of the value of the assets of said company at liquidation, its certain outstanding obliga-

tion to W. T. Mosier which the stockholders assumed upon liquidation. In all other respects the taxpayer accepts the Revenue Agent's report."

That on February 9, 1925, the defendant filed his answer to the said petition, which answer is as follows:

> "Comes now the defendant above named, and for answer to the petition of the plaintiff herein, denies each and every allegation therein contained."

That said cause was heard and determined by the court, after the parties thereto had waived trial by jury in writing, and on the 13th day of June, 1925, findings of fact were made and judgment was entered thereon in said court, as follows:

[R. 73.] "This cause came on to be heard on the 12th day of June, 1925, a judicial day of the Special May, 1925, Term of the [R. 74] above-entitled court. Both parties were present, and the plaintiff further appeared by Charles H. Garnett, his attorney, and the defendant by James A . Ingraham, Assistant United States District Attorney, and Floyd F. Toomey, Special Attorney of the Bureau of Internal Revenue. Both parties announced ready for trial, and both parties having duly made and filed herein their waiver in writing of a trial by jury, the court thereupon proceeded with the trial without a jury. The taking of evidence was begun, but not having been completed at the close of the day, court recessed and the trial of the cause was continued to 9:00 o'clock A. M. of the following day. On the 13th day of June, 1925, the trial was resumed and the taking of evidence was completed and both parties rested their case.

"Thereupon the plaintiff filed his motion in writing for judgment in his favor for the sum of $6,642.13 with

interest thereon at the rate of six percentum per annum from the 30th day of October, 1923, and costs of the action. Thereupon the defendant filed his motion in writing for judgment in his favor and for costs.

"Thereupon the cause was argued to the Court, and the Court having heard the evidence and the oral testimony of witnesses sworn and examined in open court, and having heard the arguments of counsel, and being fully advised in the premises, finds that on the 30th day of October, 1923, and after notice and demand by the defendant, as Collector of Internal Revenue for the District of Oklahoma, the plaintiff paid under protest additional income tax assessed against him by the Commissioner of Internal Revenue for the year 1920 in the sum of $8,610.84; that on the 2nd day of November, 1923, the plaintiff filed with the Commissioner his claim for refund of the said tax and that the said claim was held without action and neither rejected nor allowed by the Commissioner until April 24, 1925, on which date by letter to the plaintiff, he allowed the same for the sum of $216.26 only and rejected it for the balance; that the amount of said claim so allowed has not yet been paid; that this action was commenced by the plaintiff in this court on the 21st day of October, 1924; that the plaintiff admits that, by mistake in computation, the tax shown by and paid with his original income tax return was erroneously fixed at $5,172.92, whereas the correct amount thereof was $7,141.63, and that of the additional tax assessed against him and paid under protest, the sum of $1,968.71 was correctly assessed, and that he now claims only the sum of $6,642.13 of said additional assessment [R. 75] to have been erroneously and illegally assessed, collected and paid; that the said sum of additional tax in controversy is based upon an alleged profit on 150 shares of stock in the Osage Mercantile Company, a corporation, which were owned by the plaintiff at and prior to March 1st, 1913, and which he realized upon in liquidation of said corporation on July 20th, 1920; that the assets of the corporation were not sold at liquida-

tion, but were distributed in kind to the plaintiff and R. W. Tucker, his brother, who then owned all the stock, and who assumed all of its liabilities, whereupon it was formally dissolved by a judicial decree; that the said plaintiff and his brother, R. W. Tucker, with the same proportionate interests, continued as a co-partnership the same business, under the same name and at the same location as was formerly conducted by the said corporation; that from prior to March 1, 1913, to its dissolution the corporation had 300 shares of stock of the par value of $100.00 a share issued and outstanding, and was actively engaged in carrying on the business for which it was chartered and organized; that the fair market value of said stock on March 1, 1913, based on its book or asset value was $356.86 per share; that on March 1, 1913, the assets of said corporation consisted of the mercantile business proper including merchandise, fixtures, accounts, etc., and considerable outside real estate; that shortly prior to May 13, 1913, a new corporation, known as the Mercantile Real Estate Company, with a capital stock of $15,000.00, was formed by the stockholders of the Osage Mercantile Company; that the stockholders of the Osage Mercantile Company thereupon subscribed for all the stock of the new corporation and in the same proportion as their stockholdings in the old corporation; that said stockholders then issued their personal checks totalling $15,000.00 to the new corporation in payment for its capital stock; that the new corporation thereupon paid this $15,000.00 to the old corporation in exchange for a conveyance under date of May 13, 1913, of all of its real estate, which said real estate had a book or asset value of $40,150.00; that the old corporation thereupon declared a dividend of the same $15,000.00 back to its stockholders; that the old corporation, the Osage Mercantile Company, continued its mercantile business proper until its dissolution on July 20, 1920; that the new corporation, the Mercantile Real Estate Company, is still in existence and the plaintiff still owns the stock which he acquired in it

at its organization as above stated; that during the period between March 1, 1913, and May 14, 1913, the Osage Mercantile Company [R. 76] declared from its surplus earned prior to March 1, 1913, cash dividends in the sum of $5,796.33; that in determining the fair market value of the plaintiff's stock in the Osage Mercantile Company as of March 1, 1913, for the purpose of determining the gain derived by him upon said stock upon the liquidation of the Osage Mercantile Company on July 20, 1920, the value of the real estate so transferred to the Mercantitle Real Estate Company on May 13, 1913, viz., $40,150.00, together with the said cash dividend to the extent of $5,796.53, distributed between March 21, 1913, and May 14, 1913, or a total of $45,946.53 was excluded by the Commissioner of Internal Revenue, thereby reducing the March 1, 1913, value of said stock to $203.71 per share; that the amount realized by the plaintiff at liquidation of the corporation on July 20, 1920, was $319.46 per share, and deducting therefrom the above March 1, 1913, value of $203.71 per share leaves the plaintiff a profit or gain in realization on his stock of $115.75 a share; and that it was upon this profit per share on 150 shares that the additional tax in question was assessed by the Commissioner, but it is now admitted that such additional tax included an overassessment of $216.26 as shown by the Commissioner's letter of April 24, 1925.

"The Court further finds from the primary facts stated above that for the purpose of determining the taxable gain derived by the plaintiff on his stock in the Osage Mercantile Company, upon its liquidation on July 20, 1920, the March 1, 1913, value thereof was properly determined in the manner above set forth to be $203.71 per share, and that his gain on his stock was properly arrived at by deducting said March 1, 1913, value from the amount realized thereon at liquidation as above set forth, and that, therefore, the additional tax assessed

by the Commissioner of Internal Revenue, with the exception of the sum of $216.26, above referred to, was properly and legally assessed, collected and paid.

"The Court further finds that any good will possessed by the Osage Mercantile Company on March 1, 1913, was also enjoyed by the company at the time of its dissolution on July 20, 1920; that any such good will as may have existed inhered in and attached to the business, the name, the location and the owners thereof, and that it followed the business into the succeeding partnership enterprise and was enjoyed by the owners thereof who were the sole owners of the corporation at the time of its dissolution; that any good will [R. 77] value which may have attached to the plaintiff's stock in excess of its book value on March 1, 1913, likewise attached to his stock on July 20, 1920, and that, therefore, such good will value, if existent, could in no way affect the taxable gain derived by the plaintiff upon the liquidation of the corporation.

"The Court, therefore, finds the issues generally for the defendant, and further finds that since the Commissioner of Internal Revenue has allowed the plaintiff's claim for refund in the amount of $216.26, and that such amount of refund will be paid in due course by a Treasury check, the plaintiff should not recover judgment for the same in this action, nor for costs, but that the judgment rendered herein should be for the defendant for costs without prejudice to the plaintiff's right to receive said refund of $216.26.

"The Court further finds that the motion of the plaintiff filed herein for judgment in his favor should be overruled and denied, and that the motion of the defendant filed herein for judgment in his favor should be sustained and granted. To all of which findings of the court the defendant at the time excepted and his exception is allowed.

"It is, therefore, considered, ordered and adjudged by the Court that the motion of the plaintiff herein for judgment in his favor be, and is hereby, overruled and denied, to which order, ruling and judgment of the court, the plaintiff at the time excepted and his exception is allowed.

"It is further considered, ordered and adjudged by the court that the motion of the defendant filed herein for judgment in his favor be, and is hereby, sustained and granted, to which order, ruling and judgment of the court the plaintiff at the time excepted and his exception is allowed.

"It is further considered, ordered and adjudged by the court that the plaintiff take nothing in this action, and that the defendant have judgment for his costs, and that all costs of the action be, and they are hereby, taxed and adjudged against the plaintiff, but that this judgment shall be and is without prejudice to the plaintiff's right to demand and receive the refund of tax in the sum of $216.26 already allowed him by the Commissioner of Internal Revenue, to which order and judgment of the court the plaintiff at the time excepted, and his exception is allowed.

"Thereupon, on request of the plaintiff and for good cause shown, it is ordered that the plaintiff be granted sixty [R. 78] days from this date in which to make, serve and file his bill of exceptions herein.

"Done in open court this 13th day of June, A. D. 1925."

That thereafter, to-wit, on the 20th day of July, 1925, a writ of error was allowed from the United States Circuit Court of Appeals for the Eighth Circuit to the said District Court of the United States for the Western District Court of Oklahoma in said cause, and such pro-

ceedings were had under said writ of error that on the 5th day of August, 1925, a transcript of the record and all the proceedings in said cause in said United States District Court for the Western District of Oklahoma was filed in the United States Circuit Court of Appeals for the Eighth Circuit, sitting at St. Louis, in the state of Missouri, and said cause was entered and docketed in said Circuit Court of Appeals, entitled W. C. Tucker, Plaintiff in Error, vs. Acel. C. Alexander, Collector of Internal Revenue, Defendant in Error, and numbered 7124 on said docket, and full jurisdiction over the parties and the subject matter in said cause for reviewing the same upon said writ of error was thereupon acquired and assumed by the said Circuit Court of Appeals.

That the assignment of errors filed in said cause was as follows:

[R. 78.] "And now comes W. C .Tucker, the plaintiff above named and plaintiff in error upon the proceedings in error in the [R. 79] Circuit Court of Appeals for the Eighth Circuit, by Chas. H. Garnett, his attorney, and in connection with his petition for a writ of error, says that in the record and proceedings and in the final judgment heretofore entered in this cause manifest error has intervened to the prejudice of the plaintiff in error, to-wit:

"1. The court erred in overruling the motion of the plaintiff in error, plaintiff below, for judgment in his favor made at the conclusion of the evidence on the trial.

"2. The court erred in sustaining and granting the motion of the defendant in error, the defendant below,

for judgment in his favor made at the conclusion of the evidence on the trial.

3. The court erred in refusing to find and include a good will value of at least $100.00 a share in the fair market value of the stock of the plaintiff in error in the Osage Mercantile Company on March 1st, 1913, and in refusing to take such fair market value as the basis for determining the plaintiff's gain or loss on his said stock on liquidation of the said corporation on July 20, 1920.

"4. The court erred in finding that whatever good will was possessed by the Osage Mercantile Company at liquidation on July 20, 1920, was distributed to its stockholders with the distribution in kind of its tangible assets to them.

"5. The court erred in finding that the value of the real estate conveyed to the Mercantile Real Estate Company and the cash dividend of $5,796.53 declared from surplus earned prior to March 1, 1913, were to be excluded from the assets of the Osage Mercantile Company in arriving at the fair market value of its stock on March 1, 1913, as a basis for determining the gain realized by the plaintiff at liquidation of said company on the stock held by him.

"6. The court erred in not rendering judgment for the plaintiff in error for the sum of $6,642.13 with interest thereon at the rate of six percentum per annum from October 30th, 1923, and costs of the action.

"7. The court erred in not rendering judgment for the plaintiff in error for the sum of $216.26 with interest thereon at the rate of six percentum per annum from October 30th, 1923, and costs of the action.

"8. The court erred in rendering judgment for the defendant in error for costs. [R. 80.]

"9. The court erred in that its judgment is not supported by, but is contrary to, its findings of fact.

"10. The court erred in that its judgment is not supported by, but is contrary to, the evidence.

"11. The court erred in that its judgment is contrary to law.

"By reason whereof, the plaintiff in error prays that the judgment aforesaid may be reversed and the cause remanded to the said trial court with directions to enter its judgment therein in favor of the plaintiff in error and against the defendant in error for the sum of $6,642.13 with interest thereon at the rate of six percentum per annum from the 30th day of October, 1923, and for his costs in the action, or that it be reversed and remanded with directions to the said trial court to grant a new trial."

That afterwards, to-wit, on the 21st day of January, 1926, the case came on to be heard in the said Circuit Court of Appeals, before the Honorable Kimbrough Stone, the Honorable Arba S. Van Valkenburgh, and the Honorable Wilbur F. Booth, and on the 27th day of October, 1926, a decision and judgment was rendered and entered therein by the said Circuit Court of Appeals as follows:

"STONE, Circuit Judge, delivered the opinion of the court.

"This is an action for a refund of a portion of a tax, paid under protest, on the income of plaintiff in error (plaintiff below) for the year 1920. Plaintiff made a tax return for that year and paid upon the basis thereof. An investigation by an agent of the Department, thereafter, resulted in an additional assessment, which was paid under protest. In due time after this last payment, plaintiff filed his claim for refund. After waiting seventeen

months, in vain, for some action thereon by the Department, this action was brought.. About six months after this action was begun and before trial thereof, the Department made allowance of $216.26 (a small part of the claim) and rejected the balance of the claim. From a judgment favoring defendant but without prejudice to acceptance by plaintiff of the allowance of $216.26, this writ of error is sued out.

"In the view which we take of the issues which must determine this case, an extended statement of fact is unnecessary.

"Prior to 1913, plaintiff was half owner of the stock of a corporation which had, for some years, been engaged in a general merchandise business at Pawhuska, Oklahoma. In 1920, the corporation was voluntarily dissolved and the assets distributed in kind to plaintiff and his brother (who owned the other half of the capital stock), the two men assuming the existing indebtedness of the corporation. As half owners, the brothers continued the business as a co-partnership. The income upon which the additional tax (refund of which is now sought) was collected was the increased value of the corporate stock from March 1, 1913, to date of liquidation in 1920.

"There are two main contentions here. One is of minor importance, concerning costs herein.

"The important contention is in respect to collection of an income tax assessed upon the liquidation of the Osage Mercantile Company, of which Tucker was a stockholder. The main grounds for recovery thereof, as stated in the petition, are:

" 'That the assessment and collection of said additional income tax was erroneous and illegal in that it is based upon alleged income accruing to the plaintiff from the liquidating dividend upon the dissolu-

tion of the Osage Mercantile Company, a corporation, in which he was a stockholder; that this corporation was chartered and organized in the year 1902 with a capital stock of $15,000.00 divided into 150 shares of the par value of $100.00 each; that thereafter in the year 1906 the capital stock of said corporation was increased to $30,000.00 divided into 300 shares of the par value of $100.00 each; that on March 1, 1913, the plaintiff was the owner and holder of 112 shares of the capital stock in said corporation and the same was of the fair market value of $500.00 a share on said date; that on July 22, 1920, said corporation was liquidated and dissolved and its assets were transferred and distributed in specie to its stockholders by a liquidating dividend; that the net actual and fair market value of the assets so distributed was $88,408.97 on that date; that the share of such assets received by the plaintiff was less in value by the sum of $5,491.84 than the fair market value on March 1, 1913, of the stock he then owned plus the cost of the stock he subsequently acquired and he, therefore, sustained an actual loss in said amount on the liquidation of said corporation; that in ascertaining the gain or loss to the plaintiff upon the liquidation of said corporation the Commissioner of Internal Revenue erroneously, wrongfully and illegally assumed and took *$356.86 per share, instead of the correct sum of $500.00 per share, as the fair market value of the plaintiff's stock on March 1, 1913, and $97,292.71, instead of the correct sum of $88,408.97, as the net actual and fair market value of the assets of said corporation distributed at the time of liquidation in excess of all its liabilities then outstanding and assumed by its stockholders.'

*These figures are in error. They should be $203.71. See transcript of record in trial court, page 43.

"The collector contends that plaintiff cannot recover upon such grounds because they are different from those asserted in his claim of refund. The claim of refund is general in terms and is to the effect that there was a loss instead of a profit, but it is made specific through an incorporation, by reference, of a letter from the deputy Commissioner which sets forth the grounds of protest actually urged to payment of the tax. Those grounds were as follows:

" 'The taxpayer says that said Revenue Agent's report is erroneous (1) in that he used the book value of the taxpayer's stock in the Osage Mercantile Company on March 1, 1923, instead of the fair market value thereof as a basis for determining the gain derived therefrom at liquidation, and (2) in that he did not deduct from the capital and surplus of said company at date of liquidation, the full amount of its outstanding liability, and (3) in that he did not take into account the reduction of the value of the assets of said company at liquidation, its certain outstanding obligation to W. T. Mosier which the stockholders assumed upon liquidation. In all other respects the taxpayer accepts the Revenue Agent's report.'

"It appears, therefore, that the grounds relied upon in the petition for refund are entirely different from those contained in the Claim for Refund. Hence, the above point raised by the Collector must be determined. We think the Collector is right for the reasons following:

"This is a suit against the Government in connection with the imposition and collection of the general revenue, which is a prime governmental function; such character of actions can be maintained only when permitted by the sovereign and only upon the conditions imposed by the sovereign. Such character of action is permitted by the statute but

certain conditions are required as a condition precedent thereto. One of these conditions is that a claim for refund shall first be made to the Commissioner of Intetrnal Revenue and a period of six months allowed for his determination thereof. The evident purposes and objects of this condition are to afford the Commissioner an opportunity to correct errors made by his office and to spare the parties and the courts the burden of litigation in respect thereto. Unless the claimant were required to present to the Commissioner all of the grounds upon which he relies for refund, the above purposes and objects would be partially or entirely defeated. The resort to the courts is allowed only because the Commissioner will not correct the wrong claimed to have been done. The purposes of requiring the claim and the object of the resort to the courts would be in part or wholly defeated unless the claim contained all of the grounds relied upon by the claimant. Therefore we think it is a required precedent or limitation that the action shall be upon the same grounds and only such as are presented in the Claim. As no ground in this petition is stated in the Claim for Refund, we think this petition has no standing under the issues tendered by the petition and that the determination of the court as to this major claim was correct.

"The minor claim affects only costs and arises out of the fact that the Commissioner allowed a refund of $216.00. The tax was paid, under protest, on October 30, 1923; the Claim for Refund was filed early in November, 1923; this action was filed October 7, 1924; the ruling and above refund on the claim was made by the Commissioner April 24, 1925. The Commissioner had, under the Statute, six months after the claim was filed within which to determine the Claim and within which time plaintiff could not bring suit. As the Commissioner did not act within that period, the plaintiff was within his rights in

bringing suit. If he had based his suit upon any ground contained in the Claim and the above refund had been all or a part of the sum claimed under such ground, we think the plaintiff would have been entitled to his costs herein. But no refund of the above sum could have been secured under this petition; it was not secured because of the suit nor would the early announcement of such refund have obviated necessity for the suit nor have prevented it being brought. Under these conditions, we think the plaintiff has no right to his costs herein.

"The judgment should be and is *Affirmed.*"

Your petitioner is advised that said judgment of the Circuit Court of Appeals is final and is erroneous and that this Honorable Court should require the case to be certified to it for its review and determination under the Act of Congress permitting causes made final in the Circuit Court of Appeals to be certified for revision.

Your petitioner says that the case should be so certified for revision to this Honorable Court for the following reasons:

(1) The said decision of the Circuit Court of Appeals is in conflict with the decision of another Circuit Court of Appeals on the same matter to-wit, the decision of the Circuit Court of Appeals for the Fifth Circuit in the case of *Walker* v. *Gulf & I. Ry. Co. of Texas,* 269 Fed. 885, 891.

The conflict in the two decisions lies in this, that

in the decision in the instant case the Eighth Circuit Court of Appeals holds that in a suit for the recovery of income taxes alleged to have been erroneously and illegally assessed and collected under the Federal Revenue laws, no grounds for recovery may be alleged in the petition except the same and only such as have been previously presented in a claim to the Commissioner of Internal Revenue for refund of such taxes, and that the question of the sufficiency of the grounds alleged in such claim for refund, and of their identity with the grounds alleged in the petition upon suit, is jurisdictional, and is not waived by a failure to raise and present it for consideration and determination in the trial court, but that it may be raised and presented for the first time in an appellate tribunal where the case is up for review of a judgment upon the merits of the action. The language of the court in its decision on this point is as follows:

> "The purpose of requiring the claim and the object of the resort to the courts would be in part or wholly defeated unless the claim contained all of the grounds relied upon by the claimant. Therefore, we think it is a required precedent or limitation that the action shall be upon the same grounds and only such as are presented in the claim. As no ground in this petition is stated in the claim for refund, we think this petition has no standing under the issues tendered by the petition and that the determination of the court as to this major claim was correct."

The decision of the court in this case does not af-

firmatively show that the question of the insufficiency of the claim for refund and of the alleged difference between the grounds stated therein and those stated in the petition in the suit for recovery of the taxes, was not raised in the court below, but was first raised in said Circuit Court of Appeals, yet this fact fully appears from the record. [R. 11-15, 65, 73-78.]

The Fifth Circuit Court of Appeals in the Walker case holds that the question of the sufficiency of a claim for refund to support the particular action for recovery of taxes, and in fact the question of whether or not any such claim was filed at all prior to suit, is not jurisdictional, and is waived by the defendant unless it is raised and objection to the sufficiency of such claim, or to the failure to file a claim, is made in the trial court, and that such question can not be raised for the first time in the Circuit Court of Appeals when the case comes there for review. The language of that court in that case on this point is as follows:

> "The question was raised in this court that the record failed to show a demand for refund of the tax after its payment, as required by Rev. Stat., Sec. 3226 (Comp. St. Sec. 5949). This case is not like that of *Rock Island, Arkansas & Louisiana R. R. Co.* v. *United States*, 54 Ct. Cl. 22, recently affirmed by the United States Supreme Court (254 U. S. 141, 41 Sup. Co. 55, 65 L. Ed. . .). There, as both courts point out, the payment was without protest, or any notice that the refusal to abate was not acquiesced

in. Here, when making the payments, the railway filed its written notice, claiming that each assessment was erroneous, that the original return showing no tax to be due was correct, that the tax was paid under protest to avoid incurring the penalties, and that an action would be brought by the railway to recover the same. This might well be considered a demand for a refund on payment under protest. But, regardless of that, no such question was raised in the District Court, nor by the assignments of error. Had it been, it might have been met by further allegation and proof, if such were necessary. We do not think it can be raised here for the first time *(Retzer* v. *Wood, Collector,* 109 U. S. 185, 3 Sup Ct. 164, 27 L. Ed. 900; *Green County* v. *Thomas' Executor,* 211 U. S. 598, 602, 29 Sup. Ct. 168, 53 L. Ed. 343)."

(2) The decision of the Eighth Circuit Court of Appeals in the instant case presents three important questions of federal law which have not been, but should be, settled by this court.

The first question is: How complete, detailed and specific must be the statement of the facts relied on in a claim for refund of taxes filed with the Commissioner of Internal Revenue under the provisions of Revised Statutes, *Sec. 3226, to constitute a sufficient compliance

*Sec. 3226. (Amended by Sec. 1318, Revenue Act of 1921). No suit or preceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected, or of any penalty claimed to have been collected without authority, or of any sum alleged to have been excessive or in any manner wrongfully collected, until a claim for refund or credit has been duly filed with the Commissioner of Internal

with that statute and to be made the basis of a subsequent suit to recover the taxes claimed to be refundable?

The second question is: Is the plaintiff in an action to recover federal income taxes limited in his petition and in his suit to the precise, same and only grounds as a basis for recovery which were stated and alleged in his claim as grounds for a refund, or may he bring forward in his suit and rely upon a ground for recovery not previously stated in his claim for refund?

The third question is: Assuming that the grounds relied on in the suit must be the same as those relied on in the claim, may the statement of them in the petition upon suit be substantially and generally the same, being based upon and relating to the same subject matter and the same transactions, as those stated in the claim for refund, or must they be stated in the petition precisely, specifically and in detail just as they have been in the claim?

These are important questions of federal law which have not been settled by this court, and which affect the

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Revenue, according to the provisions of law in that regard, and the regulations of the Secretary of the Treasury established in pursuance thereof. No such suit or proceeding shall be begun before the expiration of six months from the date of filing such claim unless the Commissioner renders a decision thereon within that time, nor after the expiration of five years from the date of the payment of such tax, penalty, or sum.

"This section shall not affect any suit or proceeding instituted prior to the passage of this Act, but shall apply to all suits and proceedings instituted after the passage of this Act, whether or not barred by prior Acts of Congress."

interests of thousands of taxpayers who have filed or are filing claims for refund of income taxes with the Commissioner of Internal Revenue, and which also affect the attitude and policy of the Bureau of Internal Revenue in passing upon and determining such claims and in defending suits by taxpayers for the recovery of such taxes. There is no guide in the statutes as to the contents of such a claim for refund, and no requirement that a suit brought to recover taxes shall be based solely and only upon the grounds previously stated in such claim as the basis for a refund. There are no court decisions upon these questions prior to the two cited above. There is a subsequent decision by the Eighth Circuit Court of Appeals in which the ruling announced by it in the instant case is restated and adhered to. *Redwing Malting Co.* v. *Willcuts, Collector*, No. 7242, decided Nov. 5, 1926. But these questions are open and undecided by any controlling decision of this court, and surely are of sufficient importance and of sufficient public concern to deserve and require final and conclusive answers by this court.

(3) The Eighth Circuit Court of Appeals in the instant case has decided an important question of general law in a way probably untenable, and in conflict with the weight of authority, and has so far departed from the accepted and usual course of judicial proceedings as to

call for an exercise of this Court's power of supervision. As stated above no question of the sufficiency of the claim for refund, which was filed by the plaintiff in error with the Commissioner of Internal Revenue prior to the commencement of suit and as a basis therefor was raised, presented, considered or decided in the trial court. In that court both the plaintiff, the defendant and the court assumed without question that the claim as filed was a sufficient compliance with the statute and was a sufficient basis for the suit, and acting upon such assumption, the court in its judgment considered, passed upon and decided the merits of the plaintiff's cause of action, without the least regard to the contents of the claim for refund. It was only incidentally upon the trial, and through a letter from the Commissioner under date of April 24, 1925, introduced in evidence by the plaintiff in error for the purpose of showing that his claim for refund had in fact been allowed by the Commissioner for the sum of $216.26 and rejected for the remainder, that any purported statement in detail of the grounds on which the claim for refund was based, came into the record at all. It was only after the case reached the Circuit Court of Appeals for review that the defendant in error raised the question of the sufficiency of the claim for refund to support the plaintiff in error's cause of action as alleged in his petition. That court, as shown above, held the claim insufficient and on that

ground alone affirmed the judgment of the trial court. If the sufficiency of the claim for refund was not jurisdictional, then the holding of the Circuit Court of Appeals is certainly untenable, and in conflict with the weight of authority to the effect that any point in a case not jurisdictional can not be raised for the first time in an appellate court, and constitutes a departure from the usual and accepted course of judicial proceedings.

On the other hand, if the question of the sufficiency of the claim for refund as a basis for the plaintiff in error's cause of action as alleged in his petition was jurisdictional, then the trial court had no jurisdiction to hear, try, decide and render judgment upon the merits of the action, and such judgment should be held void for want of jurisdiction, and the Circuit Court of Appeals, when this point of jurisdiction was first raised before it and was held to be fatal to the jurisdiction of the trial court, should have held, in accordance with the accepted and usual course of judicial proceedings, that the judgment of the trial court was void for want of jurisdiction, and should have reversed such judgment and remanded the cause with directions to dismiss the action for want of jurisdiction.

Wherefore, the petitioner respectfully prays that a Writ of Certiorari be issued under the seal of the Court, directed to the United States Circuit Court of

Appeals for the Eighth Circuit, sitting at the City of St. Louis, in the State of Missouri, commanding the court to certify and send to this court on a day to be designated, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals had in said cause, to the end that this cause may be reviewed and determined by this Honorable Court as provided by the Acts of Congress establishing the Circuit Courts of Appeals and defining and regulating their jurisdiction, and providing for the certification of causes from them to this Honorable Court for review and determination; and that the said judgment of the said Circuit Court of Appeals be reversed by this Honorable Court and for such further relief as may seem proper.

And your petitioner will ever pray.

CHARLES H. GARNETT,
Attorney for Petitioner.

State of Oklahoma,
Oklahoma County, ss.

Charles H. Garnett, being first duly sworn, on his oath says that he is attorney for the above named petitioner, W. C. Tucker, in the above mentioned action and proceeding; that he has read the foregoing petition subscribed by him as attorney for the said petitioner, and knows the contents thereof; that he has personal knowledge of all proceedings had in the said cause above men-

tioned from the time the same was first instituted in the trial court, and has personal knowledge of the truth of the facts stated in the foregoing petition; and that the facts therein stated are true to the best of his knowledge and belief.

CHARLES H. GARNETT,

Subscribed and sworn to before me this 19th day of January, 1927.

(Seal) V'Roy Harrison, *Notary Public.*
My commission expires April 8, 1928.

BRIEF AND ARGUMENT

First Ground for Writ

The first ground assigned in the petition for a writ of *certiorari* is that of a conflict between the decision of the Eighth Circuit Court of Appeals in the instant case and that of the Fifth Circuit Court of Appeals in the case of *Walker* v. *Gulf & I. Ry. Co. of Texas,* 269 Fed. 885, 891. There is little to be said by way of argument upon this point. A comparison of the two decisions shows that they are squarely in conflict. In the instant case the facts are that a claim for refund was duly filed and was retained by the Commissioner without action for more than six months before suit was begun, and that upon the trial of the case no question as to the fact nor as to the sufficiency of this claim for refund was raised. But the Circuit Court of Appeals held that, notwithstanding these facts, the grounds assigned by the plaintiff in error in his claim for refund were so different from those alleged in his petition that the court had no jurisdiction to entertain and decide his suit upon the grounds alleged, and that objection to the jurisdiction on this ground could be raised for the first time in the appellate court.

In the Walker case the Fifth Circuit Court of Appeals not only refused to consider the question of the contents and sufficiency of the claim for refund, when that question was not raised in the trial court and was

raised for the first time before it, but even went further and indicated that no proof whatever of the filing of any such claim was required in the lower court, unless that point was raised and objection made by the defendant upon the trial.

It is clear that if the instant case had been before the Fifth Circuit Court of Appeals an entirely different and a contrary decision to that of the Eight Circuit Court of Appeals would have been rendered upon the question considered. And as it now stands there is one rule of law within the jurisdiction of the Fifth Circuit Court of Appeals governing the filing and contents of a claim for refund of income taxes and the grounds for recovery that may be asserted and relied upon in a suit following a rejection of such claim, and an entirely different one within the jurisdiction of the Eighth Circuit Court of Appeals. The law is not the same to every citizen regardless of his place of residence. The citizen of the Fifth Circuit has his rights measured and determined by one rule, while the citizen of the Eighth Circuit in precisely in the same situation has his rights measured and determined by an entirely different rule. This condition of affairs is wrong and not to be tolerated longer than is necessary for this Court to declare the true and correct rule to be applied everywhere in measuring the rights of every citizen depending upon the same state of facts

—whether the Fifth Circuit Court of Appeals or the Eighth Circuit Court of Appeals is right or whether the right lies somewhere between their respective positions.

Second Ground for Writ

This ground raises the question of the general importance of a construction and interpretation by this Court of Revised Statutes, Sec. 3226, as to how precise, definite and specific a statement of facts the taxpayer must set forth as grounds for his claim for refund of taxes to make such claim legally sufficient to be considered and passed upon by the Commissioner and likewise legally sufficient to confer jurisdiction upon a court in an action for the recovery of the taxes claimed to be refundable, and also the extent to which the taxpayer in a suit to recover taxes is limited and restricted, if at all, to precisely the same grounds stated in his claim for refund.

Counsel for the plaintiff in error says from his personal experience, and from the experience of others of which he has knowledge, that it is the common practice of taxpayers claiming refunds to set out the grounds therefor as briefly and concisely as possible and hence broadly and in general terms, and that such practice has apparently had the approval of the Commissioner of Internal Revenue. Evidence in the form of affidavits, state-

ments and documents may be and generally are submitted with and in support of a claim for refund and this evidence should and does go into detail as to the precise facts and grounds upon which the claim rests. Thus a marked distinction is made between the averments in the claim of the ultimate facts upon which the taxpayer relies and the detailed and primary facts presented by the evidence to support the general averments of the claim. For this reason it is of grave importance to taxpayers generally to know whether or not a claim for refund of taxes must allege precisely and in detail every fact and every item of evidence upon which the claim is based or which the claimant might desire later to bring forward in a suit to recover the taxes, if the claim for refund be not granted, and also to know whether or not he is barred from asserting in the suit any ground for recovery of the taxes discovered after the filing of a claim, and hence not included therein.

The statute and the decisions make it clear that the filing of a claim for refund and its rejection by the Commissioner, or its retention by him without action for six months, is a condition precedent to the right to maintain a suit to recover income taxes. But neither the statute nor any court decision lays down any sort of restriction, limitation, requirement, prescription or provision as to what such claim for refund shall contain. The

statute, Revised Statutes, Sec. 3220, as amended by Sec. 1315 of the Revenue Act of 1921, authorizes the Secretary of the Treasury "to remit, refund and pay back all taxes erroneously or illegally assessed or collected, all penalties collected without authority, and all taxes that appear to be unjustly assessed or excessive in amount, or in any manner wrongfully collected." It would appear, therefore, that an averment in a claim that the taxes sought to be refunded were erroneously and illegally assessed and collected would be a sufficient compliance with the statute. The duty would then rest upon the claimant to support such averment by evidence sufficient to establish that the taxes had been erroneously and illegally assessed and collected.

The position taken by the Eighth Circuit Court of Appeals, followed to its logical conclusion, would mean that the filing of a claim for refund was in fact the commencement of an action to recover the taxes, and that the claim itself was in effect the claimant's pleading or statement of his cause of action, and that he was thereafter forever bound by the theory and grounds for relief asserted in his claim and could not ever thereafter change such theory or grounds or take a new position or assert any new ground, even when he went into court. And if the filing of the claim is the commencement of the action, then when the same has been rejected by the Com-

missioner and suit is brought in court, such suit is in effect nothing more than an appeal from the Commissioner's action, and the issues in the case in court must be confined to the issues made up before the Commissioner on the claim for refund. Indeed, the position taken, if followed to its logical conclusion, would lead further and would preclude the taxpayer from producing in court in support of his suit any evidence in addition to or other than that presented to the Commissioner, because if the Commissioner must have before him all the averments of fact in support of the claim in order for him to pass upon the merits of it intelligently and correctly, he should also have before him all the evidence which the taxpayer has to support the claim. Otherwise, the taxpayer might withhold evidence from the Commissioner, or might discover new evidence after the Commissioner had rejected his claim, which, if it had been presented to the Commissioner, might have required or caused the allowance of the claim and have rendered the suit unnecessary. If this rule obtained, then any suit brought for the recovery of taxes after the rejection of a claim by the Commissioner would be nothing more nor less than an appeal from the Commissioner to the court, and the power and jurisdiction of the court would be limited merely to a review of the correctness of the Commissioner's decision upon the averments of fact in the claim and the evidence presented

before him. Clearly, there is nothing in the statute which requires or supports this procedure and no court decision has been cited which even indicates it.

The correctness of such procedure is negatived by the fact that the Commissioner is not required to assign any reason for rejecting a claim and is not required to act on it within any fixed time or at all. He may hold it indefinitely. But, after six months, the claimant may bring suit as though the claim were rejected. That is what the plaintiff in error did in this case. But, if the claim is the basis of a subsequent action in court to recover the taxes, and if the claimant must specify in his claim the precise grounds on which he relies and is thereafter to be precluded from asserting any new, additional or different ground, then it would seem that the Commissioner should be *required* to pass on the claim, and to state in detail his ground for rejecting it, in order that the issues for the suit might be fully made up on both sides, the claim constituting the statement of the claimant's cause of action, and the reasons for its rejection the Commissioner's defense thereto. And if the claimant should be restricted in his suit to the evidence adduced before the Commissioner, then the defense in the suit should likewise be restricted to the evidence on which the Commissioner relied in rejecting the claim.

It is not conceivable that the law would estop a taxpayer from adopting a new theory in court, or varying the theory on which his claim was presented to the Commissioner, or alleging any new or additional facts in court, or varying those presented before the Commissioner, and at the same time would permit the Government or the Collector as defendant to have full liberty to adopt any theory of defense to the suit, or bring forward any facts available in defense without regard to the theory or the facts upon which the Commissioner rejected the claim or held it without action. Indeed, since the Commissioner is not required to act on the claim at all, there can be no estoppel as to the defendant in the suit, and there can be no framing of the issues on both sides of the controversy before the Commissioner, and upon no principle of justice, fairness and equality before the law could it be held that the issues are made up and fixed beyond possibility or variation as to one party to the controversy and no restriction at all placed upon the other.

The reason assigned by the Circuit Court of Appeals for its holding is that the full merits of the taxpayer's claim should be presented to the Commissioner so that he might pass upon and allow the same, if it deserved allowance, and thus "spare the parties and the courts the burden of litigation in respect thereto." This reasoning seems sound as a general principle, but as a

basis for denying the right to a recovery in suit upon any ground other than that stated in the claim for refund, it is clearly unsound. The object of a claim for refund is to recover money which the claimant thinks he is entitled to. An action at law is for the same purpose. It is not conceivable that any considerable number of citizens would purposely present their claims for refund in such form as to conceal from the Commissioner the real grounds on which they hoped to get the money, or would intentionally withhold from him any evidence which would tend to establish their rights to the money, so that he might reject their claims and thus give them a chance to sue in court to recover the same thing they would have obtained, if the claims had been allowed. Surely, not many people, if they could get the money sought by a claim for refund, would prefer to have such claim rejected so that they might have an opportunity to bring a suit in court, with its attendant expense of costs, attorney's fees, and time, to get the same money. Such action would be contrary to the established rules of human conduct. If, in the suit, any new theory is asserted, or any new facts alleged, or any new evidence produced, it may be considered certain that these grounds were overlooked or were not available when the claim was presented to the Commissioner. And is not the necessity of bringing suit sufficient penalty to the

claimant for having overlooked any fact, ground or evidence which he might have presented to the Commissioner?

In this connection as illustrating the importance and concern with which the decision of the Circuit Court of Appeals in the instant case is regarded by those familiar with and directly interested in the question of the correct procedure in presenting claims for refund to the Commissioner, the comment on the case by the editors of the Commerce Clearing House Federal Tax Service is submitted. This service is prepared, edited, published and distributed by experts and specialists in matters relating to the interpretation and administration of the federal revenue laws, and is relied upon by thousands of subscribers for information and advice in respect of proceedings under such laws. The institution maintains offices in New York, Washington and Chicago, and describes itself as, "A complete and highly specialized organization devoted to editing and serviceing authoritative systems of information on taxation."

The quoted matter is presented here, not as an authority that is entitled to consideration by this Court, but for what it merits as an expression of the views of the writer, who is one skilled in tax matters and wholly without any personal interest in the outcome of the instant suit. The quotation is from page 5179 of Volume

2, Commerce Clearing House Federal Tax Service 1926, as follows:

> *"Recovery of Taxes by Suit Must Be Upon Grounds Stated in Claim for Refund. Application by Recent Court Decision Seems Incorrect."*
>
> "A recent court decision, in applying the principle that taxes may be recovered by a taxpayer by suit upon grounds only as stated in the claim for refund, would bar many taxpayers from refunds, if the decision is correct. The taxpayer brought suit to recover additional taxes which he was required to pay upon the receipt of liquidating dividends of a corporation in 1920. In the taxpayer's petition before the court the taxpayer alleged the March 1, 1913, value of the stock which he held in the corporation on that date, the net actual and fair market value of the assets distributed upon dissolution, that such assets were less in value than the fair market value of his stock on March 1, 1913, and that the Commissioner erroneously took a certain sum as the fair market value of his stock on March 1, 1913, instead of the correct sum, as stated in the petition, and that the Commissioner used a certain sum instead of the correct sum as the net actual and fair market value of the assets of the corporation distributed at the time of liquidation in excess of all its liabilities then outstanding and assumed by the stockholders. It was contended on behalf of the Government that the taxpayer could not recover because the grounds in his petition before the Court were different from those asserted in his claim for refund. The grounds in the claim for refund were that the Department used the book value of the taxpayer's stock on March 1, 1913, instead of the fair market value on that date, as the basis for determining gain from the liquidation; that the Department did not deduct from the capital and surplus of the company at the time of liquidation the full

amount of its outstanding liability, and that the Department did not take into account the reduction of the value of the assets of the company at liquidation on account of certain outstanding obligations. The Court stated that 'the grounds relied upon in the petition for refund were entirely different from those contained in the claim for refund.' * * * It will be noted that the claim for refund involves the same transaction which is described in the taxpayer's petition before the Court. Had the taxpayer filed a claim for refund to recover the additional taxes which he was required to pay upon the liquidation dividend, and then later brought suit to recover taxes, alleging that he had not been allowed sufficient depreciation or alleging some other ground in no way connected with the liquidation of the corporation, it would seem that a court might be correct in refusing to allow him to bring suit without having made a claim for refund based upon the disallowance of such depreciation, or such other ground. However, in the above case the taxpayer is not bringing suit for the recovery of taxes paid in connection with a different transaction than that referred to in the claim for refund. The case seems incorrect.

"*Tucker* v. *Alexander*, U. S. C. C. A., Eighth Circuit."

For the same reason attention is called to the following paragraph from *The Kiplinger Tax Letter*, dated December 20, 1926, from the Kiplinger Washington Agency, Albee Bldg., Washington, D. C., an institution of a similar, though somewhat different, nature to that of the Commerce Clearing House:

"*Possibility that many taxpayers will be barred from refunds* is seen in recent court decision that

> taxes may be recovered by suit only upon grounds stated in claim filed with Bureau. This is case of *Tucker* v. *Alexander,* decided by the Eighth Circuit Court. General view here is that finding is faulty, and will not stand on appeal; that claim is sufficiently supported if growing out of the same circumstances."

In addition to the foregoing, counsel for the plaintiff in error has received numerous letters from lawyers and accountants specializing in federal tax matters and practicing before the Treasury Department and Bureau of Internal Revenue and United States Board of Tax Appeals, commenting on the decisions of the Circuit Court of Appeals in the instant case and generally expressing the opinion that such decision is wrong and would have the effect of barring the allowance of a large number of meritorious claims of taxpayers for refund, and suggesting the advisibility and importance of an effort to bring the case before this court for review and determination, to the end that the point on which the Circuit Court of Appeals' decision turned might be cleared up and finally and definitely settled.

The Circuit Court of Appeals for the Eighth Circuit is definitely committed to the holding that unless the precise ground for recovery of tax alleged in the petition upon suit was stated in the claim for refund filed with the Commissioner preceding the suit, the court is without jurisdiction to entertain such suit. In the case

of *Redwing Malting Company* v. *Willcuts, Collector,* No. 7242, decided November 5, 1926, and not yet reported, that court uses the following language:

> "It does not appear from the record that any claim under Sub-section (4) for refund covering the loss of good will as a sustained loss during the taxable year was presented to the Commissioner of Internal Revenue prior to bringing this action and a refund requested. The application for refund does not appear in the record. Such application is a condition precedent to the jurisdiction of this Court in matters of this character. The precise ground upon which the refund is demanded must be stated in the application to the Commissioner, and we think, if that is not done, a party cannot base a recovery in the Court upon an entirely different and distinct ground from that presented to the Commissioner."

As already stated, there is no authority for the above holdings of the Circuit Court of Appeals for the Eighth Circuit, other than those decisions themselves. The decisions cite no authority in support of such holding. The statute which provides for and requires the filing of a claim for refund, contains no provision and no indication as to what must or should be stated in such claim for refund. It merely says that taxes erroneously or illegally assessed or collected, or unjustly assessed or excessive in amount shall be refunded, and that no suit for such taxes shall be maintained until *a claim* for refund has been duly filed with the Commissioner of Internal Revenue.

In this connection attention is called to a comparison of the language used in the plaintiff in error's claim for refund and that used in his petition in the suit for the purpose of showing the fineness of the distinction drawn by the Circuit Court of Appeals between what it terms the grounds alleged in the one instrument and those alleged in the other, because of which it holds that the claim for refund is fatally and jurisdictionally defective and insufficient to support the cause of action stated in the petition.

In the petition it is alleged that the corporate stock in question on March 1, 1913, "was of the fair market value of $500.00, a share on said date," and that "the Commissioner of Internal Revenue erroneously, wrongfully and illegally assumed and took *$356.85 [$203.71]; per share, instead of the correct sum of $500.00 per share, as the fair market value of the plaintiff's stock on March 1, 1913" [R. 4]. In the claim for refund it is alleged as error on the part of the Commissioner "that he used the book value of the taxpayer's stock in the Osage Mercantile Company on March 1, 1913, instead of the fair market value thereof, as a basis for determining the gain derived therefrom at liquidation" [R. 57]. It seems that the two statements above quoted clearly relate to the same transaction and clearly present the same question. In each

*These figures are in error. They should be $203.71. See transcript of the record in the trial court, page 43.

case the ground of objection to the Commissioner's action is that he did not take the true and correct March 1, 1913, market value of the corporate stock as a basis for determining the profit realized upon liquidation of the corporation in 1920.

Again, it is alleged in the petition in respect to the amount received by the stockholders of the corporation at liquidation "that the net actual and fair market value of the assets so distributed was $88,408.97," and "that in ascertaining the gain or loss to the plaintiff upon the liquidation of said corporation, the Commissioner of Internal Revenue erroneously, wrongfully and illegally assumed and took * * * $97,292.71, instead of the correct sum of $88,408.97, as the net actual and fair market value of the assets of said corporation distributed at the time of liquidation in excess of all its liabilities then outstanding and assumed by its stockholders" [R. 4]. In the claim for refund it is alleged as error on the part of the Commissioner "that he did not deduct from the capital or surplus of said company, at date of liquidation, the full amount of its outstanding liability" [R. 57].

Surely, the most casual comparison of the language used in these two instruments shows that they relate to the same subject-matter, the same transaction and the same state of facts. Surely it cannot be said that in a suit for recovery of taxes, the plaintiff is bound

to use and may use only the exact language taken *verbatim* from his claim for refund in stating his grounds for recovery. It should be sufficient to meet the requirements of the law as announced by the Court, that the grounds alleged and the language used in the claim for refund should relate to the same subject-matter and the same transaction and the same state of facts substantially as those alleged and relied upon in the petition in suit. Indeed, the only way in which the language of the petition could have been brought in closer conformity to that of the claims for refund would have been to have copied *verbatim* the averments of the claim.

If the law requires precise, literal and verbal conformity of the petition to the claim, then this court should do declare, and let the point be settled. If the law allows any variation in the petition from the claim and the assertion of any new ground for relief, then this court should define by some general rule the extent to which such variation or assertion of a new ground may go, and let the point be settled. And if, where a claim has been filed and no question of its sufficiency in substance has been raised in the trial court, such question can be raised for the first time in an appellate court, then this court should so declare, and let the point be settled.

Third Ground for Writ

This ground presents the question of the correctness of the decision of the Circuit Court of Appeals, assuming that its view of the facts and of the law are both correct. The record in this case shows that the tax in question was paid by the plaintiff in error under protest on the 30th day of October, 1923 [R. 74]. Under the provisions of the revenue laws (Rev. Stat., Sec. 3228, as amended by Sec. 1012, Revenue Act of 1924, Sec. 284 (b), (1), Revenue Act of 1926), he had four years from that date in which to file a claim for refund. This time is not yet expired. Therefore, the plaintiff in error might still file a claim for refund and present therein to the commissioner all and precisely the same grounds for such refund which he has alleged in his petition for recovery of the tax, and if such claim were rejected, could then maintain a new action for the tax in full conformity with the requirements of the decision of the Circuit Court of Appeals in the instant case. But he is now faced with a situation which precludes him from maintaining another suit. The trial court in this case considered his cause of action upon its merits and rendered a judgment against him thereon. This judgment now stands affirmed by the Circuit Court of Appeals. A new action for recovery of the same tax on the same grounds would be met by a plea of a former adjudication. But the Circuit

Court of Appeals has refused to review the judgment of the trial court on the merits of the case, and has affirmed such judgment on what is apparently a jurisdictional ground, which was raised for the first time in that court. Thus the plaintiff in error has had a judgment against him on the merits of his case in the trial court, which, if it stands unreversed, will preclude another suit, and has had that judgment affirmed upon a technical jurisdictional ground, which he could still avoid and remove so as to maintain another suit if the judgment of the trial court did not stand as a bar against him.

If the question on which the Circuit Court of Appeals decided the case had been raised in the trial court, and that court had held that it was without jurisdiction because of the insufficiency of the claim for refund, then the action would have been dismissed by the court for want of jurisdiction, or the plaintiff in error could have voluntarily dismissed it, and then, by filing a new claim for refund, have cured the jurisdictional ground and have brought a new action to which no objection on the grounds of the insufficiency of the claim for refund could have been urged.

For the reason above stated, the plaintiff in error says that the decision of the Circuit Court of Appeals is probably untenable and in conflict with the weight of authority, and is such a departure from the accepted and

usual course of judicial proceedings as to call for an exercise of this court's power of supervision. The situation presented is that the trial court assumed jurisdiction over the entire subject-matter of the action and rendered a judgment upon the merits of the cause of action alleged in the petition, and that the Circuit Court of Appeals holds that the trial court never had any jurisdiction to entertain the suit and that it has no jurisdiction to review the judgment of the trial court upon the merits, and thereupon affirms such judgment upon the merits, notwithstanding its holding that that court never had jurisdiction to render any such judgment. The plaintiff in error says that if the trial court was without jurisdiction to entertain the suit, then the Circuit Court of Appeals should have held that the judgment rendered was void for want of jurisdiction, and have reversed and remanded the case, with directions to the trial court to vacate its judgment and dismiss the action for want of jurisdiction. The present status of the case leaves the plaintiff in error with a judgment against him upon the merits of his cause of action, which is a complete bar to another action upon the same facts and for the same relief sought in that one, and at the same time he is denied his right to have such judgment reviewed because the reviewing court says that the trial court never had jurisdiction of the cause of action adjudicated.

For the reasons set forth in his petition and in this brief in support thereof, the petitioner and plaintiff in error asks that a writ of *certiorari* be granted as prayed for.

Respectfully submitted,

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Attorney for Petitioner and Plaintiff in Error.